IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 22946 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JACKSON ENGINEERS LTD & 2 - Petitioner(s)

Versus

UNION OF INDIA & 2 - Respondent(s)

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Appearance :
MR DHAVAL SHAH FOR MR PARESH M DAVE for Petitioners
MR JITENDRA MALKAN for Respondent(s) : 1 & 3
NOTICE SERVED BY DS for Respondent(s) : 2
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 27/01/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1.This petition challenges the Stay Order No.S/62-63/WZB/2005/C III/EB dated 17/8/2005 (Annexure “E”) and Order No.A/475-476/WZB/2005/C III/EB dated 1/9/2005 (Annexure “F”) made by the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench Mumbai, dismissing the appeals of the petitioners.

2.Heard Mr.Dhaval Shah, the learned advocate for the petitioners and Mr.Jitendra Malkan for the respondents, except respondent No.2.

3.The controversy lies in a very narrow compass and hence, the petition is taken up for final hearing and disposal today. Rule. Mr.Malkan waives service on behalf of respondents No.1 and 3.

4.Brief facts leading to this petition. On 29/4/2004, an adjudication order came to be made disallowing modvat credit of

Rs.11,28,397/- with an equal amount of penalty imposed on the petitioner company and a personal penalty of Rs.50,000/- imposed on petitioner No.3, General Manager of the petitioner company.

5.The matter was carried in appeal, but the appeals came to be dismissed on 31/12/2004 by Commissioner (Appeals), Daman / Vapi. It is averred in the petition that the Commissioner (Appeals) did not insist for pre-deposit of any amount as a condition for hearing the appeals on merits.

6.The petitioners carried the matter in appeal against the order of Commissioner (Appeals). The appeals were accompanied by an application seeking stay of demand. The say of the petitioners is that, as more than four months had elapsed and the stay applications had not come up for hearing, the representative of the

petitioners approached the Registry of the Tribunal on 29/8/2005 to make necessary inquiry. Thereupon, the representative was informed that CESTAT had already made an order on 17/8/2005 on the stay applications, and that, as the petitioners were not present at the time of hearing, a direction to deposit the full amount of duty was made by the Tribunal. It is necessary to re-produce what is stated on oath by the petitioners at this stage.

> “It appears that hearing of the stay applications was fixed before the Appellate Tribunal on 17/8/2005 but hearing notice for this hearing was not served upon the petitioners and therefore, the petitioners were not aware about their stay applications having been fixed for hearing on 17/8/2005.
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> As the hearing of the stay applications was not fixed for

sometime and the local officers were pressing for recovery of disputed amounts, the petitioners' representative personally went to the Registry of the Appellate Tribunal on 29/8/2005 when he was informed that a stay order was already passed by the Appellate Tribunal on the stay applications on 17/8/2005 and the appeals were fixed for ascertaining compliance of the stay order on 1/9/2005. On enquiring about the stay order, the petitioners' representative was informed that a copy of the order was already sent to them by post, but on further enquiry, the petitioners' representative was informed that the condition imposed by the Appellate Tribunal was for depositing the full duty amount. A copy of the stay order was however, not given to the petitioners' representative.

The petitioners therefore, sent their Consultant Shri R.K.Ghadge

(a Retd. Superintendent of Central Excise and Customs) to the Appellate Tribunal on 1/9/2005 with an application which the petitioners' consultant also filed in the Registry of the Tribunal on 1/9/2005. However, having received the application with a demand draft of Rs.500/-, the application was given back to the petitioners' consultant for the reason that the case was listed before Court III of the Appellate Tribunal on that day and hence, the petitioners' consultant was advised to submit the application before the Appellate Tribunal when the matter was called for ascertaining compliance. A copy of this application which was initially accepted by the Registry of the Tribunal and then the same was returned and which was submitted before the Appellate Tribunal by Shri Ghadge on 1/9/2005 is enclosed and marked as Annexure “D”.

However, the Appellate Tribunal was not inclined to consider petitioners' case and it dismissed the appeals vide Order dated 1/9/2005 for non-compliance with the stay order.

It was after the above order pronounced in the open Court on 1/9/2005 that the petitioners received a copy of the Stay Order No.62-63/WZB/2005/C III/EB dated 17/8/2005 on 8/9/2005. A copy of this Stay Order No.62-63/WZB/2005/C III/EB dated 17/8/2005 is enclosed and marked as Annexure “E”.

The petitioners have thereafter received a copy of the Final Order No.A/475-476/WZB/2005/C III/EB dated 1/9/2005 also on 15/10/2005. A copy of this Final Order No.A/475-476/WZB/2005/C III/EB dated 1/9/2005 is enclosed and marked as Annexure “F”.”

7.In the backdrop of aforesaid fact situation the petitioners have approached this Court. Not only aforestated facts, which have remained uncontroverted, but the record reveals this to be a gross case which requires intervention by this Court in exercise of its extraordinary jurisdiction.

8.The Tribunal has made an order (Annexure “E”) on the stay applications and the said order records date of hearing and date of decision to be `17/8/2005'. In paragraph No.2 of the order, it is stated “Accordingly, we dismiss the stay petitions for non-prosecution and the appellants are directed to deposit the entire amount of duty of Rs.11,28,397/- by 31/8/2005.”. When one peruses the next page of the xerox copy of the order of Tribunal rejecting the stay applications, it is found that the order made by the Member (Judicial)

has been signed by the Member (Technical) only on 24/8/2005. However, what is more shocking is the fact that the order was dispatched from the Mumbai G.P.O. only on 31st August 2005 as the photocopy of the envelope (available at page 53 of the petition) reveals.

9.On 1/9/2005, CESTAT dismisses the appeals for non-compliance after recording that the appellants (petitioners herein) have failed to comply with stay order dated 17/8/2005 directing them to pre-deposit by 31/8/2005.

10.The petitioner has also made a grievance that the petitioner was never served with a notice of hearing and it was only when the representative of the petitioner went to make personal inquiry on 29/8/2005 that the petitioner came to know about the order dated 17/8/2005. What is more disturbing is that, vide application dated 30/8/2005 (Annexure

"D"), the petitioners sought modification of the stay order and in paragraphs No.2 and 3, the fact about the representative of the petitioner having made inquiry on 29/8/2005 appears and also the fact that the appeals are listed for reporting compliance on 1/9/2005. A xerox copy of the said application bears a rubber stamp acknowledgement of the inward clerk of CESTAT, Mumbai along with a super-imposed endorsement reading "cancelled". It is the say of the petitioners that the application was presented on 1/9/2005 personally with the Registry of the Tribunal and initially, the same was accepted, but was returned to the representative of the petitioner to be presented before the Bench as the matter had already been listed on the said day, namely, 1/9/2005. The petitioner has also stated that the said application was personally presented before the Bench, despite which the Bench recorded non-compliance of its earlier order

dated 17/8/2005 and dismissed the appeals.

11.As can be seen from the application (Annexure “D”) moved by the petitioners before the Tribunal, it is categorically averred in the said application that the petitioners had not received any intimation of personal hearing from CESTAT Registry till the date of application, namely, 30/8/2005, and therefore, the principal prayer of granting a fresh date of personal hearing of the stay applications.

12.This is a case where the Tribunal has prima facie violated its own Rules, namely, Rule 18 of CESTAT (Procedure) Rules, 1982. In a similar situation, this Court has laid down as to what approach the CESTAT is required to adopt in light of the provisions under the Central Excise Act, 1944 and the CESTAT (Procedure) Rules, with special reference to Rule 18 of the said Rules. In the case of

Sanghani Bright Steel v. Union of India, 2005 (186) E.L.T. 279 (Guj.), it is laid down:

> “It is necessary for CESTAT to bear in mind that under main provisions of the Central Excise Act, 1944,(the Act), it is empowered to hear and decide the appeal so as to finally adjudicate upon the rights of the parties viz. assessee and the department for the purpose of ascertainment of liability to duty or otherwise under the Act. Any decision which affects the rights of the parties, especially of an assessee, where the assessee is ultimately going to be called upon to pay duty has to take within its fold the principles of natural justice. In other words a party which is liable to be affected by the final outcome is required to be granted an opportunity of proper and reasonable hearing in accordance with law.

It is this fundamental principle which forms the basis of Rule 18 of the Rules. The said rule provides for date and place of hearing. Under sub-rule (1) of Rule 18 of the Rules it is provided that CESTAT shall notify the date and place of hearing of the appeal and/or application to the parties. Sub-rule (2) of Rule 18 of the Rules states that the issue of the notice referred to in sub-rule (1) shall not by itself be deemed to mean that the appeal or application has been admitted. Therefore, when rule 18 is read as a whole it envisages not only any notification of hearing on the notice board of CESTAT but issuance and service of individual notice to the party. Therefore, even under the Rules, it becomes necessary for CESTAT to ensure that proper notice, as may be prescribed, is issued and served

> on the parties. This would also take within its fold adequate notice. In other words notice should ensure that adequate time is available for either of the parties to make proper arrangement to appear and represent its case.
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> In the present case, principal grievance of the petitioner was and even exists today, that the petitioner was never served with notice of hearing of the appeal, and hence application for restoration."

13. Therefore, in the first instance, once the petitioner has made a grievance before the Bench that it had never received notice of hearing, it was incumbent upon the Bench to have caused inquiries to be made with the Registry of the Tribunal to ascertain the correct position. It could not have proceeded

to dismiss the appeals on the short ground of non-compliance.

14.In the case of Galaxy Exports (100%) EOU v. Union of India, by a judgement rendered on 16/12/2005 in Special Civil Application No.22418 of 2005, this Court stated:

> “10. The facts stated hereinbefore go to show that CESTAT has failed to take into consideration the fact that it is a quasi judicial body and is expected to function in accordance with law, which would take within its sweep the principles of natural justice. This is a case where the classic adage: justice should not only be done but seen to be done: applies with full rigour.”

15.If the Bench was aware of the duty enjoined on it by the Statute and the Rules, namely, to dispense justice, it would not have failed in carrying out the aforesaid exercise once the attention of the Bench was invited by the petitioners to the grievance that the petitioners had never been served with a notice of hearing of the stay applications. Either the Bench is blissfully unaware of its duties or the approach is of a person who is casual and laid-back while discharging the statutory duties. Neither of the approaches can be countenanced.

16.When the order dated 17/8/2005 rejecting the stay applications was made and signed by the Member (Technical) on 24/8/2005, the least one would have expected was application of mind. The facts go to show that the same is entirely non-existent. Directing compliance on 31/8/2005

qua an order made effective only on 24/8/2005 itself would go to indicate that the Bench was far-removed from realities. As the record reveals, the said order did not see the light of the day till 31/8/2005, i.e. the day on which it was delivered to the Post Office for onward transmission. To expect an assessee to comply with an order, which is not even served on the party on the day on which the party is supposed to report compliance, goes to show a callous attitude of not only the Bench, but the Registry of the Tribunal also. This needs to be mentioned in context of the fact that, on 29/8/2005, when the representative of the petitioners made personal inquiry with the Registry of the Tribunal, as averred in the petition, he was neither given a copy of the order of the Tribunal, nor shown the order, but was informed that the order had been already sent by post, when the facts reveal otherwise. This is a case of gross negligence.

17.May be the Tribunal and its Registry are creaking under overload of work and pendency of matters. But that cannot be a ground for making a short shrift of their respective obligations. Just as Justice Delayed is Justice Denied, Justice Hurried is Justice Buried. CESTAT is expected to balance the two. The Tribunal is required to dispense justice. Disposal of matters cannot be at the expense of justice. The Tribunal is required to bear in mind that litigation by an assessee is out of compulsion, not volition. It is a costly affair, both time-wise and money-wise. A party should not be forced to litigate like in the present case.

18.In these circumstances, neither of the impugned orders of Tribunal can be permitted to operate. Accordingly, both the Stay Order No.S/62-63/WZB/2005/C III/EB dated 17/8/2005

(Annexure “E”) and Order No.A/475-476/ WZB/2005/C III/EB dated 1/9/2005 (Annexure “F”) made by the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench Mumbai, are hereby quashed and set aside. The Stay Applications filed by the petitioners as well as the Appeals stand revived and restored to the file of the Tribunal. The Tribunal shall fix the Stay Applications and ensure that proper and reasonable opportunity of hearing is granted to the petitioners before any order is made in either of the proceedings.

19. Considering the facts that have come on record, it would be in the fitness of things that the attention of the President of the Tribunal is invited to the situation prevailing. The Registry is, therefore, directed to forward a copy of this order to the President, Central Excise & Service Tax Appellate Tribunal, West Block No.2, R.K.Puram,

New Delhi 110 066.

20.Rule made absolute accordingly. The petition stands disposed of in the aforesaid terms. There shall be no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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